to a more convenient forum pursuant to 28 USC 1404a, the transfer-of-venue statute?

The negative answer in this case by the District Court, in which the Court of Appeals tacitly concurred when it denied petitioner's petition for writs, is the first decision on the issue directly in point; but the holding conflicts in principle with decisions by this Court, to the effect that all prior venue provisions are subject to the overriding considerations of 28 USC 1404a, which was adopted "without hint that some (types of actions) should be excluded". *Ex parte Collett*, 337 US 55 (1949); *Kilpatrick vs Texas & Pacific R. Co.*, 337 US 75 (1949); *United States vs National City Lines*, 337 US 78 (1949).

The holding below is also in conflict with this Court's decision that when one of the inseparable parts of a civil action is transferable, 28 USC 1404a requires transfer of the entire action, even though the other part would not otherwise be transferable. *Continental Grain Co. vs Barge FBL-585*, 364 US 19 (1960).

This case is the latest in the series of cases delineating the scope and application of 28 USC 1404a;[1] and, aside from the merits of the controversy, therefore presents an important question of statutory construction for resolution by this Court.

## STATUTES INVOLVED

62 Stat. 937, 28 USC 1404a: "For the convenience of parties and witnesses, in the interest of justice, a district

[1] The latest opinions of this Court, on the scope of the Transfer of Venue Act, are *Hoffman vs Blaski*, and *Sullivan vs Behimer*, 363 US 335 (1960); *Continental Grain Co. vs Barge FBL-585*, 364 US 19 (1960).

court may transfer any civil action to any other district or division where it might have been brought."

61 Stat. 669, 9 USC 8: "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

## STATEMENT OF THE CASE

In August, 1959, Texas San Juan Oil Corporation (then known as Deepwater Exploration Company), owner of the drilling tender *Deepwater No. 1*, chartered the vessel and appurtenant equipment to petitioner, for use in drilling an oil well off the Louisiana coast.

After termination of the drilling, the vessel was laid up at Grand Isle, Louisiana, and was later re-delivered to Texas San Juan.

Thereafter, Texas San Juan filed the within libel in the Southern District of New York, under section 8 of the Federal Arbitration Act (9 USC 8), to compel arbitration of certain disputes arising out of the charter.

Writs of foreign attachment were issued, and sums which petitioner had on deposit in the Chase Manhattan

Bank, and which Arabian-American Oil Company owed petitioner, were attached. Petitioner appeared specially, only as claimant of the credits attached. Petitioner has not been served *in personam*.

The libelant is a Delaware corporation with an office in Dallas, Texas. It is also authorized to do business in Louisiana, but not in New York.

Petitioner is a Delaware corporation, with places of business in Oklahoma City, Oklahoma, and in New Orleans. It has no office, and is not doing business, in the Southern District of New York.

Practically all of the witnesses in this proceeding, and pertinent records, are located in or near the Eastern District of Louisiana, and not the Southern District of New York.[2]

Petitioner accordingly moved, under 28 USC 1404a, for an order transferring this proceeding, and the pendant arbitration, to the Eastern District of Louisiana for the convenience of parties and witnesses, in the interest of justice.

Judge Levet, while conceding in his opinion that petitioner's showing of convenience was not seriously disputed, denied the motion to transfer, solely on the ground that the charter provided for arbitration at New York.

[2] The sirgle affidavit filed by the libelant in opposition to the motion to transfer, does not point to one witness or record located in or near the Southern District of New York.

Thereafter, Judge Levet denied petitioner's application for certification, pursuant to the Interlocutory Appeals Act (28 USC 1292b), of the question presented by this petition.

Petitioner, being without any other means of obtaining appellate review of Judge Levet's order, then moved the Court of Appeals for leave to file petition for writs of mandamus or prohibition.

On October 30, 1961, the Court of Appeals denied the petition for writs, and petitioner is accordingly without any remedy other than that sought herein.

## ARGUMENT

### a—Certiorari Should be Granted

The application of 28 USC 1404a has been delineated in a series of decisions by this Court involving FELA cases, *in-rem* admiralty actions, forums in which the defendant could have been sued with his consent but not otherwise, declaratory-judgment proceedings, anti-trust actions, and suits in one state court to enjoin FELA actions in another.[3]

The question of applicability *vel non* of 28 USC 1404a to actions to compel arbitration, and to the arbitrations

[3] *Ex Parte Collett*, 337 US 55 (1949); *Kilpatrick vs Texas & Pacific R. Co.*, 337 US 75 (1949); *United States vs National City Lines*, 337 US 78 (1949); *Boyd vs Grand Trunk Western R. Co.*, 338 US 263 (1949); *Kerotest Mfg. Co. vs C-O-Two Co.*, 342 US 180 (1952) (dictum); *Pope vs Atlantic Coast Line R. Co.*, 345 US 379 (1953); *Norwood vs Kirkpatrick*, 349 US 29 (1955); *Hoffman vs Blaski*, and *Sullivan vs Behimer*, 363 US 335 (1960); *Continental Grain Co. vs Barge FBL-585*, 364 US 19 (1960).

themselves, is of obvious importance in light of the increasing use of arbitration clauses in labor, maritime and other types of contracts.

It is submitted that the decision below is unwarrantedly restrictive of the salutary purpose of 28 USC 1404a, and that, in any event, regardless of the merits of the holding, the issue should be set at rest definitively by this Court.

**b—This Is a "Civil Action" and May be Transferred Under 28 USC 1404a**

The Federal Transfer Act (28 USC 1404a) specifically permits transfer, for the convenience of parties and witnesses, of "any civil action" to any other district where it might have been brought.[4] 28 USC 1404a is applicable to admiralty proceedings. *Continental Grain Co. vs Barge FBL-585*, 364 US 19 (1960).

This proceeding, brought to compel arbitration, is a "civil action"—"one brought to recover some civil right, or to obtain redress for some wrong not being a crime or misdemeanor". *Black's Law Dictionary* (4th ed.) 312.

An arbitration proceeding is a "civil action", at least from the moment when a "court is first asked to participate in the proceeding, for instance, either by a motion to compel or to stay the arbitration". *Minkoff vs Scranton Frocks*, 172 FS 870, 876 (SD NY-1959).

[4] Petitioner has an office, and is doing business, in the Eastern District of Louisiana, where this proceeding might have been brought, and to which petitioner sought to have it transferred.

A "petition to compel arbitration is only the initial step in a litigation which seeks as its goal a judgment affirming the award". *Davenport vs Proctor & Gamble Manufacturing Co.*, 241 F2d 511, 514 (CA 2-1957).

"The proceeding from the outset (has) all the elements of a judicial controversy"; and the various steps in the proceeding are "not separable controversies". *Marchant vs Mead-Morrison Mfg. Co.*, 29 F2d 40, 43 (CA 2-1928), cert. den., 278 US 655.

"The entire proceeding seems to be well within the meaning of the constitutional requirement of a 'case or controversy' . . . The same reasoning should prevail in determining whether the proceeding is a 'suit' (i.e., civil action) under the Judicial Code." Note, *Enforcement of State Arbitration Laws in Federal Courts*, 42 Harv. L. Rev. 801, 802 (1929).

Under Section 8 of the Arbitration Act (9 USC 8), "the arbitration is made a phase of the suit in admiralty". *The Sydfold*, 25 FS 662, 663 (SD NY-1938). The District Court so held in overruling exceptions filed by petitioner to the libel in this case (194 FS 396, 1961 AMC 1614).

Since the suit to compel arbitration, of itself, is clearly a civil action subject to transfer, the arbitration proceeding which is an integral part of the suit, may also be transferred.

The decision below to the contrary, is in conflict with this Court's holding in *Continental Grain Co. vs Barge*

*FBL-585*, 364 US 19 (1960), that when one of the inseparable parts of a civil action is transferable, 28 USC 1404a permits, and indeed requires, transfer of the entire action, even though the other part would not otherwise be transferable.

As this Court said in *Continental Grain*, "the idea behind Sec. 1404a is that where a 'civil action' to vindicate a wrong—however brought in a court—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court". 364 US at 26.

It is true that the instant charter names New York City as the place for arbitration of disputes arising thereunder, and section 4 of the Arbitration Act provides, in part, that "the hearing and proceedings, under such agreement (for arbitration), shall be within the district in which the petition for an order directing such arbitration is filed" (9 USC 4).

These, however, are mere venue provisions[5] subject, like all venue provisions, to the over-riding policy considerations of 28 USC 1404a.

In refusing to apply those considerations to the instant proceeding, the courts below acted contrary to the principle announced by this Court in *Ex parte Collett*, 337 US 55 (1949) (the "phrase ['any civil action'] is

[5] See, *e.g.*, *Continental Grain Co. vs Dant & Russell*, 118 F2d 967 (CA 9-1941), in which the court ordered the arbitration to proceed within the District of Oregon, although the agreement called for arbitration in New York.

used without qualification, without hint that some should be excluded"); *Kilpatrick vs Texas & Pacific R. Co.*, 337 US 75 (1949) (section 1404a is not limited in its application to those civil actions specified in the Venue Chapter of Title 28, but is of general application, and the phrase, "any civil action", "means what it says"); and *United States vs National City Lines*, 337 US 78 (1949) (the "unequivocal words of section 1404a and the legislative history [establish] that Congress indeed meant what it said").

**c—That the Louisiana District Is the More Convenient Forum Is Not Disputed**

Everything connected with this dispute occurred in the Gulf Coast area, largely within the Eastern District of Louisiana, and the persons involved, with scarcely any exception, reside in that district.

Libelant has failed to designate a single witness or pertinent record located in or near the Southern District of New York.

Judge Levet himself recognized that the "various reasons . . . advanced by (petitioner) showing the Louisiana District to be more convenient for the parties and witnesses", were not actually disputed.[4]

It is accordingly evident that the District Judge's refusal to order the requested transfer, was not a matter of exercise of discretion after weighing con-

[4] The libelant merely contended that "the convenience of its witnesses is none of (petitioner's) business". But see *Anthony vs RKO Radio Pictures*, 103 FS 56 (SD NY-1951).

flicting conveniences, but was predicated solely on his erroneous view of the law, that 28 USC 1404a may not be invoked in this arbitration case.[7]

**d—Issuance of Writs Is Appropriate to Compel Transfer of This Action**

Even if it could be said that the District Judge was exercising his discretion, there is ample authority for granting relief when the "district judge refuses to order a transfer, and, in doing so, 'abuses' his discretion". *Arrowhead Co. vs The Aimee Lykes*, 193 F2d 83, 84 (CA 2-1951). And see *Ford Motor Co. vs Ryan*, 182 F2d 329 (CA 2-1950); *Magnetic Engineering & Mfg. Co. vs Dings Mfg. Co.*, 178 F2d 866 (CA 2-1950).

Certainly, the refusal of the District Court to transfer this action, if viewed as an exercise of discretion, was arbitrary.

In considering petitioner's showing that both parties do business in the forum sought by petitioner, that neither does business in the forum in which the suit was brought, and that 'the Louisiana District (is) more convenient for the parties and witnesses", the District

[7] The District Judge cited, by way of analogy, *Wm. H. Muller & Co. vs Swedish American Line*, 224 F2d 806 (CA 2-1955), and other cases holding that a provision in a bill of lading, calling for exclusive jurisdiction in a foreign court, is enforceable when not unreasonable [but see *The Monrosa v. Carbon Black*, 359 U'S 180 (1959)]. But those cases involved merely the right of the court, in the absence of any statute on the subject, to decline to accept jurisdiction in deference to the designated foreign jurisdiction, and not the right of a litigant to have the venue of an action transferred to a more convenient forum within the United States, pursuant to express Congressional authorization.

Judge conceded that "the libellant does not seriously dispute these facts". But he nevertheless found "no substantial reason" to transfer the venue.

As held by the Court below in *Ford Motor Co. vs Ryan*, 182 F2d 329, 329-330 (CA 2-1950), "the order, refusing to direct the transfer, . . . (is) the kind of interlocutory order with which the court can properly deal by way of such a writ . . . (as) a sufficiently 'extraordinary cause' to empower us to do so, if the district judge . . . abused his discretion".

In the *Ryan* case, the Court stressed the problem presented in reverse here: "Were the case transferred, many witnesses residing in New York could not be compelled to testify in open court, as they can be if the case is not transferred". 182 F2d at 331.

The transfer was accordingly denied in *Ryan*; in the present case, for the same reason, it should be granted.

While the Federal Arbitration Act confers upon the arbitrators, the right to summon witnesses, that right is subject to the same limitations as "subpoenas to appear and testify before the court" (9 USC 7), and therefore can extend only within the district, or to 100 miles from the place of the hearing. Rule 32D(e), General Admiralty Rules, as amended, adopted April 17, 1961; FRCP 45(e).

It is apparent that to assure personal attendance before the arbitrators of necessary witnesses, most of whom are not employees of any of the parties, the

proceeding should be conducted in the Eastern District of Louisiana.

Even the District Court itself, sitting in New York, cannot force the witnesses, resident in or near Louisiana, to appear in New York, under the limitations imposed by Rule 32D(e) of the present General Admiralty Rules.

Further, the arbitrators, under the Commercial Arbitration Rules, or such other rules as they may adopt, are not bound to receive depositions. In fact, Section 28 of the Commercial Arbitration Rules specifically provides that the parties "shall . . . present . . . witnesses", and does not provide for depositions.

This puts both parties to the necessity of persuading the witnesses to appear before the arbitrators in New York. It also means that if successful in persuading persons not in their employ to come to New York, the parties will be put to considerable travel and allied expense.

This Court, in *Los Angeles Brush Corporation vs James*, 272 US 701, 707 (1927), recognized the power to direct mandamus to a district court which has put a party to unwarranted expense: "One of the causes for complaint of the general administration of justice is the expense it entails upon the litigants; and, so far as it reasonably may do so, this Court is anxious to minimize the basis for such complaints". See also *McCullough vs Cosgrave*, 309 US 634 (1940).

Further, "it will be extremely difficult . . . to show that (petitioner) lost the case because of the handicap of the (denial of) transfer. As for the added cost of trying the case in the (objectionable) forum, it is hard to see how in any event it could be recoverable . . . for the error would be that of the court. There are therefore at least plausible grounds why (the Court) should issue the writ." *Magnetic Engineering & Mfg. Co. vs Dings Mfg. Co.*, 178 F2d 866, 869 (CA 2-1950).

It is beyond question that a dispute between two corporations, neither of which is doing business in New York, but both of which are doing business in the Eastern District of Louisiana, arising out of a problem—unique to, and well understood in, Louisiana—of operation and maintenance of an off-shore drilling tender, and involving witnesses and experts resident therein, and records located there, can best be handled in the Eastern District of Louisiana.[8]

## CONCLUSION

For the foregoing reasons:

1—This petition for a writ of *certiorari* should be granted; and petitioner further prays that:

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[8] For the same reasons, the court in *Chemical Carriers vs L. Smit & Co.'s. Internationale S.*, 154 FS 886 (SD NY-1957)—one of the cases cited by the district judge, by way of analogy—refused to sustain a provision in a bill of lading designating the jurisdiction for adjudication of disputes thereunder. In determining whether such a provision may be sustained, *forum non conveniens* criteria are applied. *Cf. Wm. H. Muller & Co. vs Swedish American Line*, 224 F2d 806, 808 (CA 2-1955).

2—A writ of mandamus or prohibition issue from this Court, directed to the Honorable Richard A. Levet, Judge of the United States Disrict Court for the Southern District of New York, to show cause on a day to be fixed by this Court, why mandamus or prohibition should not issue from this Court, directing him to vacate his order entered on September 8, 1961, denying petitioner's motion for transfer, and to enter an appropriate order transferring this action, and the pendant arbitration, to the United States District Court for the Eastern District of Louisiana, New Orleans Division; and that

3—Petitioner have such additional relief and process as may be necessary and appropriate in the premises.

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*Eugene Underwood.*
Of Counsel

November 29, 1961

## APPENDIX

### District Court's Memorandum and Order

LEVET, D. J.

The defendant appears specially and moves to transfer this action and the arbitration proceeding which is a phase of this action to the Eastern District of Louisiana, New Orleans Division, for the convenience of the parties and witnesses, pursuant to the provisions of Title 28 USC §1404(a), which is as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The libellant is in effect the successor to another corporation, Deepwater Exploration Company, which executed a bareboat charter of the latter's drilling tender, "Deepwater No. 1."

The libellant is a Delaware corporation with an office in Dallas, Texas, and is authorized to do and is doing business in the Eastern District of Louisiana, but not in the Southern District of New York.

Respondent is a Delaware corporation, with offices and places of business in Oklahoma City and in New Orleans, it has no office and is not doing business in the Southern District of New York.

Various reasons are advanced by respondent showing the Louisiana District to be more convenient for the parties and witnesses.

The libellant does not seriously dispute these facts, but, at least as to its witnesses, curtly states in its brief that while "libelant appreciates respondent's concern lest libelant be inconvenienced, libelant submits that the convenience of its witnesses is none of respondent's business."

The libellant points out that respondent by the charter party agreed to arbitrate at New York. Paragraphs 22 and 23 of this agreement are as follows:

> "22. *Applicable Law.* This Bareboat Charter Party shall be deemed to be a New York contract and shall be construed and enforced in accordance with the admiralty law of the United States and, to the extent applicable, the law of the State of New York."

> "23. *Arbitration.* Should any dispute arise under this Bareboat Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by Owner, one by Charterer and the third by the two so chosen, or in default thereof, by a court of competent jurisdiction: and their decision or that of any two of them shall be final, and their award may be made a rule of court and a judgment or decree entered thereon. The Charterer and the Owner each shall bear one-half of the fees and expenses of the arbitrators."

The primary question then is whether Section 1404(a) applies here in an action to enforce arbitration and to the place where the arbitration is conducted.

Obviously, the transfer of this action to another district does not of itself affect the arbitration or alter the place where such arbitration is to be held unless the transfer itself or the transferee court requires the arbitration to proceed in such district. What respondent is seeking is a direction to the arbitrators as to the place where they hold their hearings or a transfer which in and of itself might produce the same result. However, there appears to be no substantial reason why the respondent should be relieved from its contractual obligations.

There is pertinent analogy between the arbitration clause in question and provisions, for example, in bills of lading providing that all controversies under the bill of lading shall be determined under the jurisdiction of the court of carrier's country. These provisions, if not unreasonable, are sustained. See *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 2 Cir., 1955, 224 F. 2d 806, cert. denied, 1955, 350 U. S. 903. See also *Krenger v. Pennsylvania R. Co.*, 2 Cir., 1949, 174 F. 2d 556. Cf. *Chemical Carriers v. L. Smit & Co.'s Internationale S.*, D. C. S. D. N. Y., 1957, 154 F. Supp. 886; *Sociedade Brasileira, etc. v. S.S. Punta Del Este*, D. C. D. N. J., 1955, 135 F. Supp. 394.

In my opinion, no substantial reason exists to deny the enforcement of the arbitration forum chosen by the parties.

Accordingly, the motion is denied.

So ordered.

Dated: New York, N. Y.

September 7, 1961.

RICHARD H. LEVET
*United States District Judge*

(Entered September 8, 1961)

**Court of Appeals' Order**

A petition for a writ of mandamus and/or prohibition having been filed herein by counsel for the petitioner and argument having been had thereon,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

(Rendered October 30, 1961)

**Memorandum as to Record**

The following parts of the records below are included in the certified transcript filed herein with the petition for certiorari, and are therefore not reproduced herein:

Libel; Notice of Special Appearance; Motion to Transfer; Supporting Affidavit; Affidavit in Behalf of Libelant;

Application under Interlocutory Appeals Act; Order Denying Application for Certification; Motion for Leave to File Petition for Writs; Petition to Court of Appeals for Writs of Prohibition or Mandamus.